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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

DEFENDANT JAMES ARTHUR RAY'S REPLY IN SUPPORT OF MOTION IN LIMINE (NO. 1) TO EXCLUDE EVIDENCE OF PRIOR ACTS PURSUANT TO ARIZ. R. EVID. 404(B) AND 403

I. INTRODUCTION

The State's Response extinguishes any doubt that the evidence it seeks to introduce—of ill-defined and entirely irrelevant prior occurrences—is inadmissible. The State has charged Mr. Ray with three counts of reckless manslaughter, in violation of ARS § 13-1103, arising from the terrible accident that occurred on October 8, 2009. Yet the State now seeks to introduce evidence that, over the years of many different personal development programs with thousands of participants involving a wide variety of confidence-building exercises, a handful of JRI participants have been injured. The State identifies *no* proper purpose for this purported evidence under Rule 404(b), relying instead on nonsensical assertions and inapposite case law. Moreover, the State completely ignores, and utterly fails to satisfy, its burden to "prove *by clear and convincing evidence* that the prior bad acts were committed and that the defendant committed the acts." *State v. Terrazas*, 189 Ariz. 580, 582 (1997) (emphasis in original). In place of evidence, the State strings together hearsay, conjecture, and inadmissible and irrelevant attorney statements. Arizona law requires much more. Mr. Ray respectfully requests a prompt evidentiary hearing under *State v. Terrazas* and an end to the State's attempt to try Mr. Ray with inadmissible evidence of character and prejudice, rather than evidence of what happened on October 8, 2009.

II. ARGUMENT AND AUTHORITIES

A. The Evidence the State Seeks to Introduce Does Not Fall Within the Limited Exceptions of 404(b) and Is Thus Inadmissible Character Evidence.

The State acknowledges, as it must, that prior-acts evidence is not admissible to prove a defendant's character or propensity to engage in criminal conduct. Instead, the State must show that the evidence is offered for a proper purpose under Rule 404(b). *State v. Vigil*, 195 Ariz. 189, 192 (Ct. App. 1999). To carry its burden, the State must "must articulate precisely the evidential hypothesis by which a fact of consequence may be inferred from the other acts evidence." *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994); *see also State v. Coghill*, 216 Ariz. 578, 583 (Ct. App. 2007). The State's Response falls far short of the mark.

As an initial matter, the State fails even to *describe* the prior events with specificity, let alone articulate a "precis[e] . . . evidential hypothesis" as to each one. *Mayans*, 17 F.3d at 1181.

The State cannot satisfy its burden by making vague assertions and blanket arguments as to a host of entirely disparate alleged occurrences. The alleged prior acts must be examined individually, and the State must establish a legitimate purpose under 404(b) for each.

1. Evidence Allegedly Related to Intent, Knowledge, and Absence of Mistake

The State asserts that all of the evidence it seeks to introduce reveals Mr. Ray's intent. But a prior event introduced to prove intent "simply lacks probative value unless it is sufficiently similar to the subsequent offense," because "if the prior act is not similar, it does not tell the jury anything about what the defendant intended to do in his later action." *United States* v. *Miller,* 874 F.2d 1255, 1269 (9th Cir. 1989). The State recognizes that "[e]vidence of a prior crime, act, or wrong cannot be introduced to prove a defendant's mental state unless it is similar to the act for which the defendant is on trial." *State* v. *Woody,* 173 Ariz. 561, 563 (Ct. App. 1992) (citing *Miller,* 874 F.2d 1255). But the State fails to heed *Woody*'s meaning. In that case, the defendant was charged with vehicular manslaughter and DUI. The State sought to introduce, under 404(b), evidence of the defendant's nine previous DUI arrests to show his reckless indifference to human life. After an evidentiary hearing, the trial court ruled that only *one of the nine* previous DUI incidents was admissible. *That* prior conviction, the trial court reasoned, "was closer in time to the accident" at issue and had closely related facts, inasmuch as both involved late-night speeding. 173 Ariz. at 562. The other DUIs were excluded. In contrast to the prior DUI admitted in *Woody*, the disparate incidents at JRI seminars involving distinct exercises are not even the same type or class of offenses as the charged conduct in this case. As explained further below, these prior events are obviously not "sufficiently similar" for purposes of Rule 404(b).

a. Suicide of Colleen Conway

The State argues that the tragic suicide of Colleen Conway is "significan[t]" not because of "the tragedy itself," but because it demonstrates "the reaction of the JRI staff to the event." Response at 6. The State never explains how that alleged "reaction" bears upon Mr. Ray's mental state on October 8, 2009. More fundamentally, the State fails to reconcile its disavowal of "the tragedy itself" with the rule that prior events cannot be introduced to prove intent unless they are

similar to the event at issue. The State's vacuous assertion that injuries "at other James Ray events" go "directly to the fact that Defendant knew or should have known that he was placing individuals in danger of injury," Response at 8, flatly ignores the requirement that "[i]t must be shown that prior accidents occurred under circumstances the same or similar to the present accident." *DeElena* v. *Southern Pac. Co.*, 121 Ariz. 563, 567-68 (1979). The State does not even attempt to connect the necessary dots by explaining how an unexplained suicide at a local shopping mall could have put Mr. Ray on any notice whatsoever of the risks attendant to sweat lodge ceremonies.

b. Eye and hand injuries at non-sweat lodge events.

Similarly, it is not plausible to say that the eye and hand injuries the State alleges—at events that, again, *did not even involve sweat lodge ceremonies*—put Mr. Ray on notice of the risks related to sweat lodges. The alleged eye injury occurred when a participant declined safety goggles during an exercise using an archery arrow; the hand injury occurred during a brick or board-breaking exercise. *See* Motion at 4. The State's suggestion that these two events placed Mr. Ray on notice "that he was placing individuals in danger of injury," Response at 8, must fail: "if the prior act is not similar, it does not tell the jury anything about what the defendant intended to do in his later action." *Miller,* 874 F.2d at 1269.

c. Alleged injuries at prior sweat lodge ceremonies.

The occurrences the State alleges from prior sweat lodge ceremonies fail for a related reason: there is no evidence that the alleged injuries bear any resemblance to the deaths at issue in this case. The theory behind admitting prior acts to show intent is that "*similar results* do not usually occur through abnormal causes." *State v. Lee*, 25 Ariz. App. 220, 226-227 (Ct. App. 1975) (emphasis added). Yet, as described below, the State offers no evidence of similar results.

2. Evidence Allegedly Related to Motive and Plan

The State's attempt to link the prior occurrences to Mr. Ray's "motive and plan" is bizarre. *Nowhere* in the State's Response is *any* explanation of how the alleged prior mishaps relate to Mr. Ray's purported "plan" to attract participants to his seminars, much less how that alleged plan bears on the charges of criminal recklessness. Indeed, the State's theory is self-contradictory. The

State claims that Mr. Ray *increased* the risk of his events to generate profit, Response at 8 (Mr. Ray "pushed the enveloped" by offering events involving "extreme physical challenges"), but also *decreased* the risk of his events to generate profit, *id.* (Mr. Ray "minimized the danger"). Unsurprisingly, the State cites no case law in support of this Janus-faced theory.

B. The State Has Not Satisfied, and Cannot Satisfy, Its Evidentiary Burden.

"[B]efore admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act." *Terrazas*, 189 Ariz. at 584. The State blatantly ignores its burden under this rule, and certainly does not meet it. Instead, the State baldly asserts that a prior sweat lodge participant, Daniel Pfankuch, suffered from heat stroke, and that others suffered ill-defined forms of physical distress. Response at 3–4. In support, the State offers no more than hearsay statements and its own speculation. *Id.* Indeed, the only document the State specifically identifies is a *statement by defense counsel*, which of course is not evidence. *See, e.g. Barcamerica Intern. USA Trust v. Tyfield Importers, Inc.* 289 F.3d 589, 593 n.4 (9th Cir. 2002).[1]

The State's reference to *other* evidentiary contexts, in which the standards for admissibility are lower, is misplaced. *See* Response at 9 (discussing relevance standard under Rule 401 and rules of admissibility under Rule 104(a)). Under *Terrazas*, the State bears the heavy burden of "prov[ing] *by clear and convincing evidence* that the prior bad acts were committed and that the defendant committed the acts," and the court must exercise "extreme care" before admitting the evidence. 189 Ariz. at 582, 584.

The State could not satisfy this demanding standard even if its allegations were somehow admissible. The State completely fails to acknowledge or refute the information in Mr. Pfankuch's medical records, *compare* Motion at 3–4 *with* Response at 3, or the many witnesses who contradict the State's account of the 2005 incident. And the State has come forward with no

[1] Moreover, defense counsel's view *in December of 2009* of the 2005 incident, to which the State refers, would unquestionably have been different had the State disclosed *all* of the evidence in its possession—much of which contradicted the State's account as presented to the grand jury on February 3, 2010—including for example, Mr. Pfankuch's medical records, which were in the State's possession on December 9, 2009. Diskin Tr. 49:24-50:2, Exhibit 59 to the Declaration of Truc T. Do, filed in support of Motion to Change Place of Trial and Motion to Compel Disclosure, June 29, 2010.

evidence whatsoever that the incidents at other JRI events involved *any* misconduct by Mr. Ray, let alone recklessness. Mr. Ray demands a *Terrazas* hearing as to each witness that the State alleges supports its conclusory statements regarding prior injuries.[2]

C. The Evidence Is Unduly Prejudicial Under Rule 403.

Situations where evidence is more prejudicial than probative "are very likely to arise in the prior bad act context," *State v. Anthony*, 218 Ariz. 439, 445 (2008) (internal quotation mark omitted), so much so that "[w]hen the evidence concerns prior bad acts," the rules of evidence "have a different thrust, and the suppositional balance no longer tilts towards admission." *State v. Salazar*, 181 Ariz. 87, 91 (Ct. App. 1994).

Here, the "extreme care" that Arizona courts must exercise with evidence of prior acts calls for exclusion. The events the State seeks to introduce would not only prejudice Mr. Ray's defense, but would consume inordinate time and resources. To take just one example, the Conway suicide would necessitate a mini-trial within the trial. The record reveals nothing about Ms. Conway's mental health, treatment history, or prior suicide attempts. Such facts would need to be established before the State could even conceivably link her suicide to Mr. Ray's conduct. Because the litany of unrelated events the State seeks to introduce would confuse jurors, consume undue judicial resources and generate prejudice against Mr. Ray, all without shedding any appreciable light on the charges in the indictment, the evidence must be excluded.

III. CONCLUSION

For the foregoing reasons, Mr. Ray requests the Court grant his motion to exclude evidence of prior acts pursuant to Arizona Rules of Evidence 404(b) and 403.

[2] The Court should reject the State's request to supplement its responses. The State has pursued this case for 10 months. Mr. Ray is entitled to know what evidence of prior acts the State will seek to admit in order to prepare for his defense. Moreover, although the State purports to have interviewed "[o]nly a limited number of participants from prior events," Response at 4 n.2, the State in fact has interviewed 24 participants or witnesses from prior events.

DATED: August 10, 2010

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